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Supreme Court of the United States

OCTOBER TERM, 1955

No. 489

DAN DURLEY, PETITIONER,

vs.

NATHAN MAYO, CUSTODIAN, FLORIDA STATE
PRISON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF FLORIDA

PETITION FOR CERTIORARI FILED APRIL 18, 1955

CERTIORARI GRANTED OCTOBER 24, 1955

SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT, STATE OF FLORIDA,
JANUARY TERM, A. D. 1955

DAN DURLEY, Petitioner,

vs.

NATHAN MAYO, Prison Custodian, Respondent

PETITION FOR WRIT OF HABEAS CORPUS—Filed February 10,
1955

To the Court:

Comes now the Petitioner, Dan Durley, in proper person and represents unto this Honorable Court as follow:

He is unlawfully imprisoned and restrained of his liberty by the aforesaid custodian, Nathan Mayo, at the Florida State Prison, Raiford, Florida.

Petitioner's detention and imprisonment is without basis in law or fact, violates his rights under the laws and Constitution of the State of Florida, and is an abuse of the Due Process Clause of the 14th Amendment to the Constitution of the United States of America.

Respondent's sole color of authority he deprives the Petitioner of his liberty is found in a void and unlawful judgment and sentence entered against petitioner by the Criminal Court of Record in and for Polk County, Florida, on the date of October, 19th, 1945, pursuant to an illegal conviction for the offense of Cattle Stealing.

There are attached hereto and made a part hereof, styled by exhibit letters as indicated below, the following documents, all of which has been certified as true and correct by the Clerk of Court, Criminal Court of Record, for Polk County, Florida.

Exhibit "A" a document which purports to be an information, #4172, charging stealing cattle on the 7th day of July, 1945, five head of cattle.

Exhibit "B" a document which purports to be an information, #4179, charging stealing three head of cattle on the date of July 29th, 1945.

Exhibit "C" a document which purports to be three

judgments under information #4172, bearing date of October 19, 1945.

[fol. 3] Exhibit "D" a document which purports to be three judgments under information #4179, bearing date of October 19th., 1945.

Petitioner hereinafter sets forth facts, laws and circumstances upon which he relies in support of this petition, and identifies each under the following numerical sections:

Section 1. The document (Exhibit "A") which purports to be a criminal information, is neither a sufficient nor a lawful basis upon which to invoke a trial prosecution, as shown by the reasons hereinafter set forth.

Section 2. The document (Exhibit "C") which purports to be three judgments and sentences under information #4172, is null and void for the reasons hereinafter set forth.

Section 3. The document (Exhibit "B") which purports to be an information, #4179 is neither a sufficient nor a lawful basis upon which to invoke a trial prosecution, as shown by the reasons hereinafter set forth.

Section 4. The document (Exhibit "D") which purports to be three judgments and sentences under information, information #4179, is null and void for the reasons hereinafter set forth.

Section I

The Document (Exhibit "A") is neither a sufficient nor a lawful basis for prosecution thereunder for the following reasons:

1. The property stolen (cattle) are not described as required by law. It neither give color, description, ear marks nor brand, wherein the cattle could be identified as belonging to the alleged owner.

2. The information dividing the cattle into three separate counts is placing the defendant, Petitioner in to double and triple jeopardy, for one single alleged act.

The said information, alleges that Dan Durley, et al., feloniously stole two steers (description unknown) the property of Mrs. Edna P. Bronson on the 7th day, of July, 1945.

Second Count alleges that Dan Durley et al., did steal and

carry away two cows (description unknown) the property of Mrs. Edna P. Bronson, on the 7th, day of July, 1945.

Third Count allege, that Dan Durley et al., did steal and carry away one heifer (description unknown) the property of Mrs. Edna P. Bronson, on the 7th, day of July, 1945.

The record reveal that it was only one act. The cattle [fol. 4] were all on the same range, rounded up, killed and butchered at the same time, hauled off on the same truck, at the same time and sold at the same time and was all done under one continuous act.

2. Section 1, (exhibit "A") alleged that five head of cattle was taken and carried away on the date of July 7th, 1945. Information is entitled, "Cattle Stealing," and is dividing the cattle in to separate counts erroneously put the defendants under double jeopardy.

Section 3

The document (Exhibit "B") is neither a sufficient nor lawful basis for prosecution thereunder, for the following reasons:

1. The property stolen (cattle) are not described as required by law. It neither give color; description, ear marks nor brands, wherein the cattle can be identified as required by law, wherein they could be identified as to the lawful owner.

2. The information in dividing the cattle into three separate counts is placing the defendant, "petitioner," under double jeopardy, for one single alleged act.

3. The said information alledge that Dan Durley et al. did steal, take and carry away one cow and two heifers on the 29th, day of July 1945 description unknown, the property of William C. Zippener. Erroneously attempt to make three separate and distinct acts, when the charge itself show it was only one act, and intent.

Count one charge that Dan Durley et al. did take, steal and carry away one cow on the 29th day of July, 1945. Count two, charge that Dan Durley et al. did take and carry away one heifer on the 29th, day of July 1945. Count three (identical duplicate of count two) charge that Dan Durley et al. did take steal and carry away one heifer on

the 29th, day of July 1945. The information shows that the three cattle were taken on the same date; rounded up on the same range, killed, butchered and delivered to the same market the same day and was one continuous act and intent. A trial under either count was a bar to further prosecution and by so doing placed the defendant, petitioner, under double jeopardy.

Section 4

Count four a Document (Exhibit "D") purports to be three judgments and sentences, pursuant to trial and conviction under information, #179 (Exhibit "B").

[fol. 5] Wherein the Court adjudged the petitioner to be guilty of all three counts charged within the information and pronounced sentence as follows: Five years on the first count; Second count, sentenced to five years to begin to run at the expiration of the five year sentence, pronounced in first count; Third count sentenced to five years, sentence to begin at the expiration of sentence pronounced in second count. Making a total of fifteen (15) years.

A trial on either count, was a bar to further prosecution and in violation of the Constitution of the State of Florida, Declaration of Rights Section 12 and violates the spirit of the Constitution of the United States of America. The information under which this prosecution was had, show that the larceny of the three cattle were one act and intent and under the same circumstances. The record reveals by the two co-defendants' testimony that the three cattle were all on the same range, rounded up and killed at the same time and place, butchered and carried to the same market on the same truck and show it was one continuous act.

In support of this contention is hereto attached and made a part hereof as Exhibit "E" to affidavits executed by two reliable and disinterested citizens. And, relying upon the Hearn et al. vs. State, Fla., 55 So.2d, 559 where this Court said *inter alia*:

Head Note #—. Quote:

"Where defendants took nine cows and two calves belonging to different owners, at same time, from same place and under same circumstances with same intent,

the offense was a single larceny and conviction for larceny of one cow, property of one of the owners, were a bar on grounds of former jeopardy to prosecution for larceny of the remaining cattle.

This case seems to be parallel and on all fours with the above cited case, *supra*. The only difference in the two cases, in the Hearn case the cattle belonged to different owners, and in the case at bar the three cattle were the property of one owner. But taken at the same time and under the same circumstances and intent and one act.

There can be no controversy on this question, as this Court has *analogous* ruled where several articles are taken, at the same time and under the same circumstances with one intent and one continuous act it is only one larceny and one offense. Wherefore ~~two of~~ the judgments and five (5) year sentences are null and void and of no effect. And, under information #4179 could only carry one five (5) year sentence.

[Vol. 6]

Section 2

A document (Exhibit "C") which purports to be three separate judgments and sentences, pursuant to conviction under information # 4172; (Exhibit "A") imposed October 19th, 1945. Five (5) year sentence under count one of information # 4172 to begin at the expiration of former five (5) sentence imposed under count three of information # 4179. (Exhibit "B") Sentence to five (5) years under count two of information # 4172 to begin to run at the expiration of sentence under count one.

Sentenced to five (5) years on count three of said information, to begin at the expiration of count two of said information.

These three five (5) year sentences to run consecutive-making a total of fifteen (15) years, running consecutively with the three five (5) year sentences imposed under the three counts of information 4179, making a grand total of thirty (30) years. The excessive sentences were all imposed on October 19th, 1945.

There can be no controversy in that two of the five year sentences imposed pursuant to conviction of cattle stealing

on July 7th, 1945 are null and void and of no effect as the two five (5) year sentences imposed pursuant to conviction of cattle stealing under information # 4179, are null and void. The maximum sentences that could have been lawfully imposed would have been five (5) years, under both informations, making a total of ten (10) years, and the two five year sentences running consecutively and as one ten (10) year sentence in accordance with Chapter 954.06, Fla. Statute, 1941, the ten year sentence expired November 8th, 1951. And, the petitioner is being illegally deprived of his liberty and held in prison in violation of his Constitutional Rights both State and Federal, supra, and, without any authority of law whatsoever.

The record reveals that cattle taken on the date of July 7th, 1945 were all on the same range, rounded up and killed at the same time butchered and carried to the market at the same time, on the same truck, and sold to the same market, and was one continuous act with one intent. And that the petitioner has twice been placed under jeopardy for the same act. See affidavit (Exhibit "E" supra.)

Petitioner calls the Court's attention to the fact that he is [fol. 7] not guilty of the alleged offense and knew nothing about such an offense being committed whatsoever, and hereby attaches affidavits sworn to by the co-defendants as true and made a part hereof as exhibit ("F").

This letter of affidavit is self explanatory, giving his reasons as to why he implicated the petitioner. QUOTE, "... hoping that it would aid me when my case came up." He also states under oath that any testimony given by himself heretofore (at the trial) that had any weight in convicting Dan Durley for stealing cows in Polk County, was a falsehood.

He further states under oath in said affidavit, QUOTE: "Dan Durley never knew of any cattle dealings on our part and never received a dime for any cows stolen by us."

Another affidavit is hereto attached and made a part hereof as (Exhibit "C".) executed by J. E. Croft.

Charles Bath a co-defendant entered a plea of guilty to both informations who also implicated the petitioner hoping that the Court would be lenient by so doing.

After the conviction and the three defendants were ac-

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cordingly sentenced and delivered to the prison, and waiting for such identifications necessary before being consigned to work, prisoners discussing their cases with each other, this affidavit is based upon the statement made by Charles Bath direct to the affiant Croft. The statement made by Bath corresponds with the affidavit executed by co-defendant, R. B. Massey, Jr.

There were no other testimony offered at the trial which would connect the petitioner directly, or indirectly, except the testimonies given by R. B. Massey, Jr., and Charles Bath who had both entered a plea of guilt to both informations. Here by affidavits they both refute their statements made by them at the trial and declare the innocence of the petitioner.

Hereto attached is an affidavit executed by L. L. Bembry (Exhibit "H") and made a part hereof, showing the whereabouts of the petitioner at the time and on the date of the alleged offense, July 7th, 1945, which establish the fact that petitioner did not have; and could not have of had any part in stealing cattle on the 7th day of July 1945, and had no connection with the co-defendants and knew nothing about their whereabouts or actions.

The three affidavits marked exhibits "F", "G" and "H" plainly show that the petitioner was convicted on perjured testimony, and without the testimonies, which have here [fol. 8] been refuted by the same witnesses, there were no testimony offered which would implicate the petitioner, directly or indirectly. There the judgments and sentences were predicated entirely and solely upon perjured testimony. There were no evidence excluding the refuted testimony whereby a jury could draw an inference nor invoke the judgment. And under such circumstances it is the duty and the Court must make some judicial process for relief.

See: *Jones v. Commonwealth of Kentucky*, 97 F. 2d 335. Head note:

Quote: "The requirements of due process can not be satisfied by mere notice and hearing if the State has contrived a conviction through the pretence of a trial which in truth is a means of depriving defendant of liberty known to be perjured. Const. Amended."

"Where falsity of perjured testimony upon which

conviction was obtained is discovered after the conviction, as well as where the testimony was known to be perjured when presented, the State must afford corrective judicial process. "Const. Amended 14."

This case comes directly under the purview of the last paragraph quoted above, being head note No. 6 of the opinion cited. The only witnesses that gave testimony in the two cases here involved, have made sworn to affidavits refuting all testimony which was incriminating to the petitioner. And, declaring the innocence of petitioner. Discarding the testimonies of the two co-defendants, leaves a blank in regards to the petitioner's name. "Dan Durley."

The petitioner ~~have~~ now placed the facts and circumstances before this Honorable Court, whereby the court can make the proper judicial process. The petitioner has brought to the attention of this Honorable Court, facts, circumstances and law, showing that there were only two charges upon which petitioner was prosecuted and convicted, that is prosecuted and convicted under information # 4172 charging stealing cattle on July 7th, 1945, the maximum sentence five (5) years, and tried and convicted under information # 4179, charging stealing cattle on the 29th day of July, 1945, the maximum sentence five (5) years, which with gain time allowed under Chapter 954.06 Fla. Statute 1941, expired October 20th 1949. Since that time petitioner has been held in prison deprived of his liberty, by the aforesaid custodian, Nathan Mayo, in violation of his Constitutional Rights afforded him by the State of Florida and the [fol. 91] Constitution of the United States of America.

Wherefore, premises considered, petitioner prays this Honorable Court that a writ of habeas corpus issue, directed to the aforesaid Custodian, Nathan Mayo, that on a day certain that he have the petitioner before this Honorable Court, and there to show lawful cause for further detention, and for other and further relief that the Court may deem right and just, and so will forever pray.

Respectfully submitted, (S.) Dan Durley, Petitioner,
Box 221, Raiford, Fla.

Duly sworn to by Dan Durley. Jurat omitted in printing.

[fol. 10] EXHIBIT, "A" TO PETITION

In the Criminal Court of Record, of the County of Polk and State of Florida, in the year of our Lord one thousand nine hundred and forty-five.

STATE OF FLORIDA

vs.

DAN DURLEY, E. B. MASSEY, JR., CHARLES BATH

Information for Stealing Cattle

In the name and by authority of the State of Florida.

Gunter Stephenson, County Solicitor for the County of Polk, prosecuting for the State of Florida in the said County, under oath, information makes that Dan Durley, R. B. Massey, Jr., and Charles Bath of the County of Polk and State of Florida, on the 7th day of July in the year of our Lord, one thousand nine hundred and forty-five in the County and State aforesaid, did unlawfully and feloniously steal, take and carry away two steers, a more particular description of which is to the County Solicitor unknown, of the goods, chattels and property of Mrs. Edna P. Bronson, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State of Florida.

Second Count: Gunter Stephenson, County Solicitor for the County of Polk, prosecuting for the State of Florida in the said County, under oath, further charges that Dan Durley, R. B. Massey, Jr., and Charles Bath, of the County of Polk and State of Florida, on the 7th day of July, 1945, in the County and State aforesaid, did unlawfully and feloniously steal, take and carry away two cows, a more particular description of which is to the County Solicitor unknown, of the goods, chattels, and property of Mrs. Edna P. Bronson, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State

Third Count: Gunter Stephenson, County Solicitor for the County of Polk, prosecuting for the State of Florida, in the said County, under oath, further charges that Dan Durley, R. B. Massey, Jr., and Charles Bath, of the County of Polk and State of Florida, on the 7th day of July, 1945, in the County and State aforesaid, did unlawfully and feloniously steal, take and carry away one heifer, a more particular description of which is to the County Solicitor unknown, of the goods, chattels and property of Mrs. Edna P. Bronson. Contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Florida.

Gunter Stephenson, County Solicitor, Polk County, Florida.

[fol. 11]

EXHIBIT "B" TO PETITION

In the Criminal Court of Record, of the County of Polk and State of Florida, in the year of our Lord one thousand nine hundred and forty-five.

STATE OF FLORIDA

vs.

DAN DURLEY, R. B. MASSEY, JR., CHARLES BATH

Information for Stealing Cattle

In the name and by authority of the State of Florida,

Gunter Stephenson, County Solicitor for the County of Polk, prosecuting for the State of Florida in the said County, under oath, information makes that Dan Durley, R. B. Massey, Jr., and Charles Bath, of the County of Polk and State of Florida, on the 29th day of July in the year of our Lord, one thousand nine hundred and forty-five in the County and State aforesaid, did unlawfully and feloniously steal, take and carry away one cow, a more particular description of which is to the County Solicitor unknown, of the goods, chattels and property of William C. Zipperer, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State of Florida.

Second Count: Gunter Stephenson, County Solicitor for the County of Polk, prosecuting for the State of Florida in the said County, under oath; further charges that Dan Durley, R. B. Massey, Jr., and Charles Bath, of the County of Polk and State of Florida, on the 29th day of July, 1945 in the County and State aforesaid, did unlawfully and feloniously steal, take and carry away one heifer, a more particular description of which is to the County Solicitor unknown, of the goods, chattels and property of William C. Zipperer, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State of Florida.

Third Count: Gunter Stephenson, County Solicitor for the County of Polk, prosecuting for the State of Florida, in the said County, under oath, further charges that Dan Durley, R. B. Massey, Jr., and Charles Bath, of the County of Polk and State of Florida, on the 29th day of July, 1945, in the county and state aforesaid, did unlawfully and feloniously steal, take and carry away one heifer, a more particular description of which is—the County Solicitor unknown, of the goods, chattels and property of William C. Zipperer, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Florida.

Gunter Stephenson, County Solicitor, Polk County,
Florida.

[fol. 12]

EXHIBIT "C" TO PETITION

IN THE CRIMINAL COURT OF RECORD IN AND FOR POLK COUNTY,
FLORIDA

Exhibit "C"

No. 4172

STATE OF FLORIDA

vs.

DAN DURLEY, I. B. MASSEY, JR., CHARLES BATH

Stealing Cattle

Comes now the Defendant, Dan Durley, pursuant to the entry of the verdict of the jury and stands before the Court for sentences to be pronounced upon him, and having been asked by the Court if he had anything to say why the sentence of the law should not be passed upon him, offers nothing in bar thereto.

Therefore, the Court now adjudges you, Dan Durley, to be guilty of the crime of Stealing Cattle as charged in each count of the Information in this cause, for which you stand convicted by the jury, and it is the sentence of the law and the judgment of the Court, that you, Dan Durley, for your said offence charged in the First Count of the Information, be confined in the State Prison of Florida at hard labor for a term of Five (5) years, to begin at the expiration of the sentence pronounced upon you for the offense charged in the Third Count of the Information in Case No. 4179; it is the sentence of the law and the judgment of the Court that you, Dan Durley, for the offense charged in the Second Count of the Information in this cause, be confined in the State Prison of Florida at hard labor for a term of Five (5) years to begin at the expiration of the sentence imposed upon you for the offense charged in the first count of the Information in this cause; and it is the sentence of the law and the judgment of the Court that you, Dan Durley, for the offense charged in the Third Count of the Information in this cause, be confined in the State Prison of Florida at hard labor for a term of Five (5) years to begin at the expiration of the

sentence imposed upon you for the offense charged in the Second Count of the Information in this cause, this sentence to run consecutive with sentence in Case No. 4179.

This Oct. 19, A. D. 1945.

R. H. Amidon, Judge.

[fol. 13]

EXHIBIT "D" TO PETITION

IN THE CRIMINAL COURT OF RECORD IN AND FOR POLK COUNTY,
FLORIDA

No. 4179

STATE OF FLORIDA

vs.

DAN DURLEY, R. B. MASSEY, JR., AND CHARLES BATH

(Exhibit "D")

Stealing Cattle

The Defendant, Dan Durley, having been duly convicted and adjudged guilty by the Court of the offense charged in each count of the Information in this cause on Oct. 17, 1945, appears this day with his counsel of record for sentences to be pronounced upon him, and being asked by the Court if he had anything to say why the sentences of the law should not be passed upon him, offers nothing in bar thereto.

Therefore, it is the sentence of the law and the judgment of the Court that you, Dan Durley, for your said offense charged in the First Count of the Information, be confined in the State Prison of Florida at hard labor for a term of Five (5) years; it is the sentence of the law and the judgment of the Court that you, Dan Durley, for your said offense charged in the Second Count of the Information, be confined in the State Prison of Florida at hard labor for a term of Five (5) years to begin at the expiration of the sentence pronounced upon you for the offense charged in the First Count of the Information; and it is the sentence of the law and the judgment of the Court that you, Dan

Durley, for your said offense charged in the Third Count of the Information, be confined in the State Prison of Florida at hard labor for a term of Five (5) years to begin at the expiration of the sentence pronounced upon you for the offense charged in the Second Count of the Information.

This Oct. 19, A. D. 1945.

R. H. Amidon, Judge.

[fol. 14]

EXHIBIT "E" TO PETITION

Date of January 1955

Affidavit

STATE OF FLORIDA,

County of Polk:

Before me an officer duly authorized to administer oaths personally appeared, Jack, Rouse, and his wife; being affiliated and after being duly sworn, according to law, deposes and says; that they were both present at and during the trial of Dan Durley, R. B. Massey, Jr. and Charles Bath, in the Criminal Court of Record in and for Polk County, State of Florida. Wherein the State of Florida was the plaintiff and the three above named men were defendants, being charged and tried for cattle stealing on the date of (July, 7th, 1945) the trial of which, was five head of cattle, all of which, was took, at one taking, and I listened to the testimony of the two defendants, R. B. Massey and Charles Bath, each admitted to their guilt and stated that they shot down five head of cattle and then skin-ed and dressed them and carried all five of them to the market at the same time and sold them all to one market all five of them at the one sale, and on the date of July 29th, 1945, where they took three head of cattle all of them was on the same day and at the same time and sold to the one market on the same day of July 29th, all three was stole at the one time, and sold at one and same time;

I, Jack Rouse, and Mrs. Jack Rouse, name of affiant, do hereby certify that we the affiant in the foregoing instru-

ment and we have carefully read it and that is true in substance, to the best of our ability;

(S.) Jack K. Rouse, Affiant; (S.) Duaine A. Rouse, Affiant. (N. S.)

Witness: (S.) Sam L. Lupfer, Notary Public, State of Florida at Large.

Witness: My Commission Expires December 22, 1956.

Witness: 15th Date of January, 1955.

[fol. 15]

EXHIBIT "H" TO PETITION

STATE OF FLORIDA,
County of Polk:

Affidavit of L. L. Bembry

Before the subscriber this day came L. L. Bembry, who upon being duly sworn deposes and says:

That in July 1945 I was employed on a job for J. C. Kincaid in Polk County, Florida and I remember definitely that one Dan Durley worked with me on this job on Monday, July 2, Tuesday, July 3 and on Wednesday, July 4 until 2:00 o'clock P. M. That the said Dan Durley was off from work with me on Wednesday afternoon, July 4, and all of Thursday July 5. He worked with me Friday, July 6 all day and Saturday, July 7 until noon of that day.

I know that the above is true as I recall definitely when he worked and the days he did not.

Censored M. G. W.

[fol. 16]

L. L. Bembry.

Sworn to and subscribed before me on this the 14th day of December, 1945. Allie R. Barnes, Notary Public State of Florida at Large. My commission expires February 9, 1948. (Notarial Seal.)

EXHIBIT "F" TO PETITION

Affidavit of R. B. Massey, Jr.

22 March 1946.

I, Buford Massey, sometimes known as R. B. Massey, Jr., hereby, without offer of any compulsion, agreement to aid me in any way do hereby declare that any statement, testimony that I have heretofore given that had any effect or weight in convicting Dan Durley for stealing cows in Polk County was a falsehood and that I gave such testimony, hoping that it would aid me when my case came up.

I have never used an automobile that belonged to him and that I borrowed his truck on two occasions and I told him I intended to use it for wood hauling and any stealing or butchering of cows by me was done solely by me and Charles Bath, without knowledge or consent of Dan Durley or anyone for him. He is absolutely innocent of any guilt of stealing whatsoever for which he is serving time in the penitentiary and me and my associate Charles Bath are the sole guilty parties. There are some of the charges against Dan Durley that I plead guilty and also accused Dan Durley that even I don't remember, some of the charges. Dan Durley is absolutely innocent.

Dan Durley never knew of any cattle dealing on our part and never received a dime for any cows stole by us.

I butchered five or six cows for Dan Durley but they were butchered, and delivered to reputable meat markets in and around Lake Wales, Fla. The names can be supplied.

Before God is my judge Dan Durley, never had anything to do with any cattle stealing that I testified to at the trial.

Signed freely and voluntarily at the State Prison this [fol. 17] 22 day of March 1946.

Sworn to and subscribed. This statement was made before me on the 22nd day of March, 1946. H. D. Baldwin, Notary Public State of Florida at Large.
(Notarial seal)

My commission expires December 11, 1949.

Bonded by American Surety Co.

Witness: H. C. Baldwin.

R. B. Massey, Jr.

Please be it noted that this statement was made absolutely, freely and without a shade of reticence on the Part of Massey. His demeanor was such that tho he might be though he certainly was not afraid of any of the party, with us.

H. C. Baldwin.

EXHIBIT "G" TO PETITION

AFFIDAVIT OF J. E. CROFT

To Whom it May Concern:

This is to certify that the undersigned, after first being duly sworn according to law, deposes and says that on or about the 6th day of January 1946 that he had the following conversation with one Charlie Bath, said conversation taking place at the State Farm Prison located at Raiford, Florida.

While we were waiting for several hours in the main corridor the discussion of our cases became general in regards to the crimes we were in prison for, and Charlie Bath told me that he had two years for cattle stealing. I asked him if that wasn't a lot of time for a man for stealing cows, and his reply was NO, that one of the men sent to prison with him got thirty years, and the other got twenty six years. Then I asked him who the other two men were, and he told me that Dan Durley was the man who got the thirty years, and R. B. Massey was the man who got the twenty-six years, and added that Dan Durley was innocent and knew nothing about the whole affair. At this point of the conversation I asked Charlie why Durley was sent to prison if he was innocent, and his reply was that he and Massey had made an agreement beforehand that if they were caught stealing cows or with the meat, that [fol. 18] they would tell the law that they were working for Dan Durley, whom they had worked for as laborers on different occasions, but at nothing that was illegal because Durley was known to be truthful and honest, adding that he and Massey thought that by naming Durley they would be passed up and given a chance to get out of the country,

and when that didn't work that they were afraid to tell the truth and stuck to the bargain, which was false.

Bath also said that all the statements that he and Massey made on the stand at the trial were false and nature in regards to Dan Durley having any knowledge or taking any part in the crime, and if there was any way that he could help Durley, without hurting himself he would be glad to do so.

The above statement was voluntarily made without compensation of any kind or any threats upon my person, nor am I, J. E. Croft prejudiced against either party mentioned above.

J. E. Croft.

Witness: Louise Cain.

Witness: Henry H. Farrington.

Swear and subscribed before me this 15 day of
May 1947, Louise Cain.

[fol. 19] CLERK'S CERTIFICATION TO EXHIBITS "F", "G"
and "H"

In the Supreme Court of Florida:

I, Guyte P. McCord, Clerk of the Supreme Court of Florida, do hereby certify that the attached pages numbered 3, 4, 5 and 6, are true and correct copies of pages 3, 4, 5 and 6, contained in the transcript of record certified to this Court by the Criminal Court of Record for Polk County, Florida, in that certain cause lately pending in said Supreme Court wherein Dan Durley was Appellant, and State of Florida was Appellee, all as the same appears among the records and files of my said office.

In witness whereof, I have hereunto set my hand and affixed the Seal of the Supreme Court of Florida, at Tallahassee, the capital, on this the 4th day of January, A. D. 1955.

(S.) Guyte P. McCord, Clerk of the Supreme Court of Florida, (Supreme Court Seal).

[fol. 20] IN SUPREME COURT OF FLORIDA

NOTICES OF HEARING

February 10, 1955

Honorable Reeves Bowen
Assistant Attorney General
Tallahassee, Florida

In re: Dan Durley vs. Mayo

Dear Mr. Bowen:

I enclose herewith original and carbon copy of Petition for Writ of Habeas Corpus in the above cause. Please examine the original of the Petition and return to me to be placed on the Motion Calendar Monday, February 21, 1955. The carbon copy is for your file.

Most cordially, — — —, Clerk Supreme Court
GPM:O'NW CC

[fols. 21-22]

February 10, 1955.

Mr. Dan Durley
Florida State Prison
Box 221
Raiford, Florida

In re: Dan Durley vs. Mayo

Dear Mr. Durley:

I have today received from you and filed Petition for Writ of Habeas Corpus in the above cause, together with carbon copy for the Attorney General. This motion will be placed on the Motion Calendar Monday, February 21, 1955, at 9:00 o'clock A. M. You will be advised of the Court's decision.

Most Cordially, — — —, Clerk Supreme Court.

GPM:O'NW

CC:Honorable Richard W. Ervin, Attorney General,
Tallahassee, Florida.

[fols. 23-24] IN THE SUPREME COURT OF FLORIDA

DAN DURLEY, Petitioner,

vs.

NATHAN MAYO, AS PRISON CUSTODIAN OF THE STATE OF FLORIDA, Respondent.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS—
February 22, 1955

Upon consideration of the Petition for Writ of Habeas Corpus in the above cause, it appears that the Petitioner has failed to show as a condition precedent to the Writ of Habeas Corpus, probable cause to believe that he is detained in custody without lawful authority, it is ordered, therefore, that said Petition be and the same is hereby denied.

[fol. 25] [File endorsement omitted]

IN SUPREME COURT OF FLORIDA

MOTION FOR RE-HEARING—Filed March 5, 1955

[Title omitted]

May it please the court:

Comes now the petitioner, Dan Durley, in proper person and moves this Honorable Court, to re-consider the petition for writ of habeas corpus, denied February 22nd, 1955, by reason the Court did not consider that the petition showed a condition precedent to the writ of habeas corpus, probable cause to believe that he is detained without lawful authority.

1. Does habeas corpus lie to test the validity of a judgment and sentence imposed in violation of a person's Constitutional Rights afforded him by the Constitution of the United States, and the Constitution of the State of Florida?
2. Does habeas corpus lie as an avenue for relief where a person is held under double jeopardy?
3. Where a larceny is committed and several articles,

or objects taken, at the same time, at the same place, with one intent, under the same act, is it placing the defendant under double jeopardy by dividing each object into separate counts, imposing sentence on each count, when the objects taken was one act and one intent?

4. Can a judgment and sentence be held valid, when based upon perjured testimony alone?

Questions 1, 2, and 3, must be answered in the positive, Question 4, can be answered only in the negative.

See: Hearn et al., vs. State 55 So 2d 559, where this Court said *inter alia*:

"We will align ourselves with the majority rule in this country, because we feel that to permit the dividing of several larcenies of objects which are the subjects of larceny, altho belonging to separate owners, when stolen at the same time, from the same place, and under the same circumstances, with the same intent, would be violative of the spirit of the Constitution of the United States, and the State of Florida, that a man should not be put in jeopardy twice for the same offense. See also notes in 31 Lx R.A., N.S., 967."

In the case at bar, the record reveal that the cattle alleged to have been stolen under information #4172, [fol. 26] were taken at the same day, July 7th, 1945, at the same place, with one intent, under the same circumstances, hauled to the market at the same time, and only one larceny. Not having the record this allegation is supported by affidavits attached to the petition and made a part thereof as (Exhibit "E").

The said information charge, "STEALING CATTLE," meaning more than one on the 7th, day of July, 1945. Then describes the cattle as two steers, two cows and one heifer belonging to Mrs. Edna Bronson. Erroneously dividing the said larceny into three counts. The verdict of guilt as charged, meaning the larceny did include five head of cattle taken on the 7th, of July 1945.

The Florida Statute law prescribe five years the maximum sentence for such offense. Therefore, the five year sentence imposed under count two is null and void and of no effect. Likewise, the five year sentence imposed under

count three is null and void and of no effect leaving the five year sentence under count one, active.

The information #4179 charge, "STEALING CATTLE," meaning more than one taken on the 29th, day of July, 1945, describing the cattle stolen as one cow and two heifers, belonging to and the property of William C. Zipperer. The record reveals by testimony introduced by the State that the three head of cattle was taken at the same time, July 29th, 1955, at the same place, with one intent, under the same circumstances hauled to the market on one truck at the same time, sold to the same market and delivered at the same time. See affidavits attached to and made a part of the original petition as (Exhibit "E") Section 811.11 Fla Statute, 1941, F.S.A. prescribe not less than two years nor more than five years imprisonment for theft of cattle. Therefore, the five years sentence imposed under count two is null and void and of no effect. Likewise, the five year sentence imposed under count three is null and void and of no effect, as it was only one larceny committed under one act. Leaving the five year sentence active and in full force and effect.

Therefore, the five year sentence imposed under Count one of information #4172, and the five year sentence imposed under count one of information #4179, both in effect and running consecutively constitute one ten year sentence, [fol. 27] and with gain time allowed under section 954.06 Fla Statute, 1941, said ten year sentence terminated November 8th, 1951.

Since November 8th, 1951, your petitioner has been held under double jeopardy, in gross violation of the Constitution of the United States, and the Constitution of the State of Florida.

The question before the Court is, "does habeas corpus lie to test the unlawful detention, which is violative of the spirit of the Constitution of the United States and the State of Florida.

This Court ruled in the Hearn case *supra* on appeal, that to divide the several larcenies in to separate counts would be placing the accused person, under double jeopardy in violation of our great Constitution of the United States and the State of Florida.

The petitioners urge and contend that habeas corpus is the proper remedy to bring to the attention of the Court, that he is held under double jeopardy, in violation of his Constitutional Rights both State and Federal.

As is said by the Supreme Court of the United States, in the Smith vs. O'Grady, 312 U. S. 320:

"The Constitution of the United States is the supreme law of the land, "and, and the obligation to guard and enforce every right guaranteed him by the Constitution rest on the State Courts equally with the Federal Courts."

The petitioner allege in petition for writ of habeas corpus that he is illegally detained, held in prison without lawful authority and in violation of Rights assured him by the Federal and State Constitution by being twice put into jeopardy for the same offense.

If the allegations are true, and the attached affidavits are true, does it entitle the petitioner to release, under habeas corpus proceedings?

A judicial inquiry into truth and substance of causes of detention of petitioner seeking writ of habeas corpus involves the reception of testimony. 28 U.S.C.A. 451, 454, 455, 457-461.

On hearing he would have the burden of sustaining his allegations by perpond-rance of evidence. It is true they [fol. 28] (might be) denied in the affidavits filed with return, to the rule, but the denial only serves to make the issue which must be resolved by evidence taken in the usual way. They can have no other office. The witnesses who made the affidavits and allegations must be subjected to examination are terms or by deposition as are all other witnesses. And, not by the pleading and affidavits alone.

Question #4. this motion.

Can a judgment and sentence be held valid when predicated solely upon perjured testimony? And, do habeas corpus lie to test the validity of said judgment and sentence?

It is shown by affidavits (Exhibit "F,G,N,") attached to and made a part of original petition, that the judgments and sentences imposed upon petitioner, and the only color

of authority the aforesaid respondent now holds your petitioner, was based entirely upon perjured testimony, if and providing the affidavits are true, and the petitioner has a right to have the affiants brought before a commissioner to be questioned as to the truth and substance thereof.

Furthermore, both informations were facts sworn to as true, and if true would constitute offense charged therein.

The informations were based upon the testimonys of R. B. Massy, Jr, and Charles Bath, and the same persons furnishing such facts on which the informations are based, by affidavits says such statements are untrue. There were no other evidence whereby the information could be based to implicate the petitioner, directly or indirectly. Therefore the facts alleged in support of the information are not true rendering the informations without basis and of no effect.

See Jones-vs-Commonwealth of Kentucky 97 F. 2d 335, Head note quoted on page 7, of original petition.

Quote: "Where falsity of perjured testimony upon which conviction was obtained is discovered after the conviction, as well as where the testimony was known to be perjured when presented, the state must afford corrective judicial process. Const Amended 14."

[fol. 29] Petitioner further calls the Court's attention to the language used by the Supreme Court of the United States in the case of Mooney-vs-Hollohan, 231 U.S. 103 in viewing the claim of perjured testimony.

Quote Head Note 1: "Requirements of "due process" is not satisfied by mere notice and hearing if state, through prosecuting officers acting on state's behalf, has contrived conviction through pretence of trial which in truth is used as means of depriving defendant of liberty through deliberate deception of court and jury by presentation of testimony known to be perjured; and in such case state's failure to afford corrective judicial process to remedy the wrong when discovered by reasonable diligence would constitute deprivation of liberty without due process (Const. Amend. 14)"

Head Note 2: "Fourteenth Amendment governs any action for a writ of habeas corpus presented to its courts, or its executive or administrative officers. (Const. Amend. 14.)"

In the case of, Mooney-vs-Hollohan 294 U.S. 103, 102.55 S^o Ct, 340.341.342.98 L.Ed. 791-98 A.L.R. 406. The United — Supreme Court said. *Inter Alia*:

"As is quoted in Jones-vs-Commonwe-lth CCA-6th Circuit Court Judge Sioms, 97F. (2d) 338:

"The concepts of due process as it has become crystallized in the public mind and by judicial procurement is formulated in Mooney-vs-Hollohan, *supra*. Its requirement in safeguarding the liberty of the citizens against deprivation through the action of the state, embodies *embodies* those fundamental conceptions of justice which lie at the base of our civil and political institutions. Referred to in the case of:

Herbert-vs-Louisiana, 272 U.S. 312, 316, 317, 47 S. Ct. 103, 71 L. Ed. 270, 48 A.L.R. 1102, wherein it was said by the United States Supreme Court, *Inter alia*:

"This requirement can not be satisfied 'by mere notice and hearing if a State has contrived a conviction through the pretence of a trial, which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of Court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as in-consistent with the rudimentary demands of justice as the obtaining of a like result by intimidation.' If it be urged that the concept thus formulated but condemns convictions obtained by the State through testimony known by the prosecuting attorney (Officers) to have perjured, then the answer must be that the delineated requirements of Due Process in the Mooney case embraces no more than the facts of that case required, and that, 'the fundamental conceptions of justice which

lie at the base of our civil and political institutions, "must with equal abhorrence condemn as a traversity." A conviction upon perjured testimony, if later, [fol. 30] but fortunately not too late, its falseness discovered, and the State in the one case as in the other is required to afford a corrective process (Judicially) to remedy the alleged wrong. If Constitutional Rights are to be preserved and not impaired."

In the case of Skipper-vs-Schumaker, 124 Fla. 169, Sof Rep. 58 where this Court said, Inter Alia:

"A conviction brought about by State Agent, and where man's Constitutional Rights have been violated during a proceeding, renders the conviction, *Null and Void.*"

In the case of Walker-vs-Johnson, warden 312 U.S. 275, the Supreme Court of the United States said, Inter Alia:

"As it is said in Johnson-vs-Zerbst, 304 U.S. 458, 466, 58 S. Ct. 1019-1924; 82 L. Ed. 1461: Congress has expanded the right of a petitioner for Habeas Corpus, there being no doubt of the authority of the Congress to thus liberalize the Common Law proceedings on habeas corpus, it results that under this Section cited (451-454-455-457-461) a prisoner in custody may have a judicial inquiry into every phase and the truth and substance of the cause of his detention. Such a judicial inquiry involves the reception of testimony, as the language of the Statute shows."

... The disposition of application for writ of habeas corpus on matters of fact as well as of law, on allegation of petitioner and traverse, and thus of the return and accompanying affidavits without taking of testimony, is improper, 28 U.S.C.A. Section 451, 454, 461."

The petitioner feels now that he has expanded and shown a condition precedent to the issuing the writ of habeas corpus, and *prima faci* showing that he is held a prisoner unlawfully and in violation of his Constitutional Rights.

The case at bar is parallel with the Hearn et al. v. State supra, and if it was in violation of the spirit of the Federal Constitution and the Constitution of the State of Florida, in the Hearn case to divide the objects stolen and make a separate larceny then the same rule should apply in a case parallel, to the said case, in one as well as in the other.

Since the petitioner has twice been placed in jeopardy and is held in prison under such violation of rights assured him by the Federal Constitution, and the Constitution of the State of Florida, then habeas corpus is the proper remedy, and the writ should issue without delay.

Under question 4, this motion, the petition has quoted [fols. 31-32] excerpts from U. S. Supreme Court rulings, and Federal Circuit Court of Appeals, outstanding cases, that have become the law of the land, dealing with perjured testimony, which sufficiently show that the state must make some judicial process to right the wrong done a citizen when convicted of crime, when such conviction is based upon perjured testimony.

As is stated in the Walker vs. Johnson, supra; a prisoner in custody may have a judicial inquiry into every phase and the truth and substance of the cause of his detention.

In the several cases cited, it is apparent that to deprive a prisoner in custody the right to such inquiry is holding the petitioner without, "Due Process."

In the several cases cited a conviction by the use of false perjured testimony, is in violation of all Constitutional Rights of both Federal and State.

In the several cases cited supra, it must be a positive fact that habeas corpus lie to test such unlawful detention, either by and through the State Courts or the Federal Courts, and the petitioner has shown by allegations, sworn to and by affidavits sworn to as true, that the conviction and detention was and is based solely upon perjured testimony. There is not one iota of evidence in the records that would implicate the petitioner, except the testimonies of the co-defendants, including the sworn statement upon which the information was based upon, and the attached affidavits to the original petition certify that all statements made by each of them were false.

Wherefore the writ of habeas corpus should issue without delay.

In conclusion, petitioner prays that the writ of habeas corpus issue and for other and further relief, after the inquiry this Court may deem right and just and so will forever pray.

Respectfully submitted, Dan Durley, in proper person.

[fols. 33-35] IN SUPREME COURT OF FLORIDA

DAN DURLEY,
Petitioner,

I Dan Durley was tried in polk County on the date of October, 19th, 1945 for the theft of cattle, that was stold on the day of july 7th, 1945 for which I did not do I was at work on that day with, other men and Mr. L. L. Bembry, was one of them, and you will find a affidavit, on file by Mr Mimbray, and one by Mb Massey, And they are others, that will prove that I am not guilty, now on the day of july 7th, 1945, Massey and Bath swore that I was with them on that day but later they made affidavit that they give false testimony, aganest me at hte trial, and they are the ones who also give the information to the one that filed the information, and if they give false testimony, at the trial will they also give false testimony, to the one that the information, I say yes! I ask For a grand Jury investigation, but was deined, and if a grand Jury had of made an investigation, they would have found out the truth, for Massey and Bath left Polk County on the day of july 5th 1945, and went into another County on that day, they went to Osceola County, and did ont come back to Lake Wales until july 8th, they was in Osceola County until, about three oclock, 3 pm, and did not come back to Lake Wales until the 8th, july about, 8 oclock Pm, but they swore that I left Lake Wales with them, on july 7th 1945 about ten am, which is not true for they went to a Mr. Tyson home in Osceola County, on the 5th of July and I was at work on both of those daye, but I did ont know where they were ta the time of trial, but after that I had been in prison, 3

years I had a chance to talk with Mr. Tyson and He told me that Massey and Bath, came to his on July the 5th, and stayed theair until July 7th, about 3 Pm. if I had known this at the time of trial I would have not been sent to prison, fot crimes that I did not do, I am 63, years old, and no one ever accused me of being dishonest, in my life until this and this is a false hood.

Dear Mr. McCord, Will you please read this for me, to the Hox Court, or get some to, as I have been in prison for ten years in august of 1955, and I have on money to pay for this great faver, All that I can do is to pray for God to give true gidence to our leaders, and now I pray that the Love of God and the saving grace of our Lord Christ be with you All now abd Every more, Amen,

I remain as ever A child of the blessed God,

respectively yours Dan Durley, (S.) Dan Durley.

[fols. 36-37] IN SUPREME COURT OF FLORIDA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—March 22, 1955

Petitioner having filed in this cause Petition for Rehearing and having been considered, it is ordered by the Court that said Petition be and the same is hereby denied.

[fol. 38] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

DIRECTIONS OF PETITIONER TO THE CLERK FOR PREPARING
TRANSCRIPT OF RECORD TO THE UNITED STATES SUPREME
COURT ON PETITION FOR CERTIORARI—Filed December 8,
1955

The Clerk of the above-styled Court will please prepare a certified Transcript of the proceedings had in the above-styled cause for the use of the Petitioner on review by the United States Supreme Court on petition for certiorari of

the Final Judgment of the Florida Supreme Court, bearing date of February 22, 1955, denying petitioner's Petition for Writ of Habeas Corpus, in accordance with and conformity to the following directions:

1. Recite the filing and date of filing and copy in full petitioner's Petition for Writ of Habeas Corpus filed with the Supreme Court of Florida on February 10, 1955, together with all Exhibits attached thereto.
2. Recite the filing and date of entry and copy in full the Order of the Supreme Court of Florida, dated February 22, 1955, denying petitioner's Petition for Writ of Habeas Corpus.
3. Recite the filing and date of filing and copy in full the petitioner's Motion for Rehearing filed with the Supreme Court of Florida on March 5, 1955.
4. Recite the filing and date of filing and copy in full the statement of Dan Durley filed with the Supreme Court of Florida on March 7, 1955.
- [fols. 39-40] 5. Recite the filing and date of entry and copy in full the order of the Supreme Court of Florida, dated March 22, 1955, denying petitioner's Petition for Rehearing.
6. Recite the filing and date of filing and copy in full these Directions to the Clerk for Preparing Transcript of Record.
7. Recite the filing and date of filing and copy in full the Directions to the Clerk for Preparing Transcript of Record to be filed hereafter in this cause by counsel for respondent.
8. Append to the Transcript of Record the Clerk's Certificate in the form prescribed by the Florida Supreme Court Rules of Practice, and file said Transcript of Record in the Supreme Court of the United States, Washington 13, D. C.

Respectfully submitted, Neal Rutledge, 37 N. E. First Avenue, Miami 32, Florida, Counsel for Petitioner,
(S.) Neal Rutledge.

CERTIFICATE OF SERVICE (omitted or printing)

[fol. 41] IN THE SUPREME COURT OF THE
STATE OF FLORIDA

[Title omitted]

RESPONDENT'S DIRECTIONS TO THE CLERK FOR PREPARING
TRANSCRIPT OF RECORD FOR THE UNITED STATES SUPREME
COURT ON PETITION FOR CERTIORARI—Filed December 14,
1955.

The Clerk of this Court will please include the following in the transcript of record to be prepared for the United States Supreme Court on petition for certiorari to review this Court's judgment in the above styled cause, to-wit:

I

(a) Recite the filing and date of filing and copy in full the petition for writ of habeas corpus, together with all exhibits attached thereto, filed in this Court on the 9th day of May, 1949, by Dan Durley, petitioner, v. Nathan Mayo, as Custodian of State Prison, respondent.

(b) Recite the filing and date of entry and copy in full the order of this Court dated May 9, 1949, denying the petition for writ of habeas corpus mentioned in direction I, (a), supra.

[fol. 42]

II

(a) Recite the filing in this Court on March 21, 1952, of transcript of duly certified record on appeal taken by Dan Durley, appellant, v. Nathan Mayo, as Custodian of the Florida State Prison, appellee, from the Circuit Court of the Eighth Judicial Circuit in and for Union County, Florida.

(b) Recite that said appeal transcript of record shows that on January 30, 1952, Dan Durley, petitioner, filed a petition for writ of habeas corpus against Nathan Mayo, as Custodian of the Florida State Prison, respondent, in the Circuit Court of the Eighth Judicial Circuit in and for Union County, Florida, and copy in full the said petition, together with the exhibits thereto, as the same appear on pages 1 through 11 of said transcript.

(c) Recite that said appeal transcript of record shows the issuance of a writ of habeas corpus by Circuit Judge John A. H. Murphree on January 31, 1952, and copy the same in full, together with the indorsement thereon, as the same appears on page 12 of said transcript.

(d) Recite that said appeal transcript of record shows that on February 7, 1952, the said respondent filed his return to said writ of habeas corpus before Circuit Judge John A. H. Murphree, and copy said return in full, together with the indorsements thereon, as the same appears on [fol. 43] pages 15 through 17 of said transcript.

(e) Recite that said appeal transcript of record shows that on February 7, 1952, Circuit Judge John A. H. Murphree entered an order quashing the writ of habeas corpus mentioned in paragraph (c), supra, and remanding the said petitioner to the custody of the respondent, and copy said order in full, together with the indorsement thereon, as the same appears on page 14 of the said transcript.

(f) Recite that said appeal transcript of record shows that on February 21, 1952, the said petitioner, Dan Durley, filed his notice of appeal to the Supreme Court of Florida to review the said order of February 7, 1952 quashing said writ of habeas corpus and remanding said petitioner to the respondent's custody, and copy in full said notice of appeal, with the indorsement thereon, as the same appears on page 18 of said transcript.

(g) Recite that on April 1, 1952, the Supreme Court of Florida entered its order dismissing the appeal in said cause, and copy said order in full.

(S.) Richard W. Ervin, Attorney General, (S.) Reeves Bowen, Assistant Attorney General; Counsel for Respondent.

[fol. 44] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 45] PRIOR PROCEEDINGS IN FLORIDA COURTS

[fol. 46] IN THE STATE SUPREME COURT OF FLORIDA, TERM
A. D. 1949

DAN DURLEY, *Petitioner*,

vs.

NATHAN MAYO, as Custodian of State Prison, Raiford
Florida, *Respondent*.

PETITION FOR WRIT HABEAS CORPUS, Filed May 9, 1949

To the Honorable Justices of the State Supreme Court
Florida:

The petitioner Dan Durley in Proper Person (or Propri
Personā) says that he is a citizen of the United States, and
the State of Florida that he is illegally held in the
Florida State Prison by the aforesaid Custodian the cause
of illegal imprisonment is a certain commitment or mit-
timus, which he, the aforesaid Custodian now holds against
the petitioner, which was predicated upon a judgment and
sentence imposed upon the petitioner, at the fall term
of Court 1945 in and for Polk County, State of Florida,
wherein the State of Florida, was the Plaintiff and the
Petitioner was Defendant.

Your petitioner shows as follow:-

The petitioner alleges that he was tried on a bill of
information for the alleged crime of theft of cattle which
is contrary to article (5) Amendment) U. S. Constitution,
which states no person shall be held to answer for a capitol
or otherwise an infamous crime, unless on a presentment
of a grand jury. Nevertheless a trial was had and a
verdict rendered against the petitioner and pursuant to
said verdict and judgment of the Court, the petitioner
was sentenced to the Florida prison for a period of thirty
years six counts of two Bills of Information. A certified
copy of said indictment, is hereto attached and made a part
of this petition Exhibit A and B respectively.

Petitioner alleges that he is innocent of said offense and
[fol. 47] is falsely imprisoned by reason that verdict of
guilt was wholly supported by *prejudge* and perjured
testimony.

After I Dan Durley had served three years and five months at Raiford prison I wrote a writ of error coram nobis; in the month of February 1949, I was called back to Polk County, Bartow, Florida on this writ to prove my statements, after I got my witness ready to come from Georgia and the other witness from Lake Wales, Florida, to appear in my behalf and I had been informed to get these two witness, I was denied a hearing on the said writ without Court being called to order. These two aforesaid witness and affidavits would of proved that I was not guilty without a doubt in the Honorable Court's mind.

I pray and ask the Honorable Justices of the State Supreme Court of Florida to call me into there most Honorable Court for a hearing, that I may be able to prove the aforesaid statements. Please notice affidavit dated July 7th 1945 which will prove my whereabouts on said day of cattle theft.

The petitioner hereto attaches affidavits in support of his contentions marked exhibit C, D, E, respectively. Petitioner alleges that if he could of had this evidence at time of trial, there would not—been any conviction.

Conclusion

Wherefore petitioner prays the Honorable Court that a writ Habeas Corpus *is issue* directed to the aforesaid custodian Nathan Mayo, Tallahassee, Florida, that on a certain day and hour, that he have the petitioner in your Honorable Court, and to show cause for detention and on his failing to show cause for further detention, that the petitioner may go hence and for other and further relief which he might be entitled to both in law and equity. And petitioner will forever so pray.

Signature of Witness: George C. Kaufman, J. O. Andrew.

(S.) Dan Durley, Petitioner, In Pro. Pers., Box 221,
Raiford, Florida.

To whom it may concern:

This is to certify that the undersigned, after first being duly sworn according to law, deposes and says that on or about the 6th day of January 1946 that he had the following conversation with one Charlie Bath, said conversation taking place at the State Farm Prison located at Raiford, Florida.

While we were waiting for several hours in the main corridor, the discussion of our cases became general in regards to the crimes we were in prison for, and Charlie Bath told me that he had two years for cattle stealing. I asked him if that wasn't a lot of time for a man for stealing a cow, and his reply was No, that one of the men sent to prison with him got thirty years, and the other got twenty six years. Then I asked him who the other two men were, and he told me that Dan Durley was the man who got the thirty years, and R. B. Massey was the man who got the twenty six years, and added that Dan Durley was innocent and knew nothing about the whole affair. At this point of the conversation I asked Charlie why Durley was sent to prison if he was innocent, and his reply was that he and Massey had made an agreement beforehand that if they were caught stealing cows or with the meat, that they would tell the law that they were working for Dan Durley, whom they had worked for as laborers on different occasions, but at nothing that was illegal because Durley was known to be truthful and honest, adding that he and Massey thought that by naming Durley they would be passed up and given a chance to get out of the country, and when that didn't work that they were afraid to tell the truth and stuck to the bargain, which was false.

Bath also said that all the statements that he and Massey made on the stand at the trial were false and untrue in regards to Dan Durley having any knowledge or taking any part in the crime, and if there was any way that he could help Durley, without hurting himself he would be glad to do so.

The above statement was voluntarily made without compensation of any kind or any threats upon my person,

nor am I, J. E. Croft, prejudiced against either party mentioned above.

Witness: Louise Cain (S.)

Witness: Henry H. Farrington (S.)

(S.) J. E. Croft.

Sworn to and Subscribed before me this 15th day of May, 1947, (N. P. Seal) (S.) Louise Cain, Notary Public.

[fol. 49]

EXHIBIT "D" TO PETITION

22 March 1946

I, Buford Massey, sometimes known as R. B. Massey Jr., hereby, without offer of any compensation, agreement to aid me in any way do hereby declare that any statement, testimony that I have heretofore given that had any effect or weight in convicting Dan Durley for stealing cows in Polk County was a falsehood and that I gave such testimony, hoping that it would aid me when my case came up.

I have never used an automobile that belonged to him and that I borrowed his truck on two occasions and I told him I intended to use it for wood hauling and any stealing or butchering of cows by me was done solely by me and Charles Bath, without knowledge or consent of Dan Durley or anyone for him. He is absolutely innocent of any guilt of stealing whatsoever for which he is serving time in the penitentiary and me and my associate Charles Bath [fol. 50] are the sole guilty parties. There are some of the charges against Dan Durley that I plead guilty and also accused Dan Durley that even I don't remember, some of the charges—Dan Durley is absolutely innocent.

Dan Durley never knew of any cattle dealing on our part and never received a dime for any cows stole by us.

I butchered five or six cows for Dan Durley but they were butchered, and delivered to reputable meat markets in and around Lake Wales, Fla. The names can be supplied.

Before God is my judge Dan Durley, never had anything to do with any cattle stealing that I testified to at the trial.

Signed freely & voluntarily at the State Prison this 22 day of March 1946.

Witness: (S.) H. C. Baldwin,

Sworn to and subscribed. This statement was made before me on the 22nd day of March 1946, (S.) H. C. Baldwin, Notary Public, State of Florida at Large, My commission expires December 11, 1949. Bonded by American Surety Co. of N.Y., (S.) R. B. Massey, Jr.

Please be it noted that this statement was made absolutely, freely and with out a shade of reticence on the Part of Massey. His demeanor was such that tho he might be tough he certainly was not afraid of any of the party, with us.

(S.) H. C. Baldwin

[fols. 50A-51] EXHIBIT E TO PETITION

STATE OF FLORIDA,

County of Polk

Before the subscriber this day came L. L. Bembry, who upon being duly sworn) deposes and says:

That in July 1945 I was employed on a job for J. C. Kincaid in Polk County, Florida and I remember definitely that one Dan Durley worked with me on this job on Monday, July 2, Tuesday, July 3 and on, Wednesday July 4 until 2 o'clock P. M. That the said Dan Durley was off from work with me on Wednesday afternoon, July 4, and all of Thursday July 5. He worked with me Friday, July 6 all day and Saturday, July 7 until noon of that day.

I know that the above is true as I recall definitely when he worked and the days he did not.

(S.) L. L. Bembry

Sworn to and subscribed before me on this the 14th day of December, 1945. (S.) Allie R. Barnes, Notary Public, State of Florida at Large.

My Commission expires February 9, 1948; Bonded by Mass. Bonding & Ins. Co. (N. P. Seal).

[fol. 52-53] IN THE SUPREME COURT OF FLORIDA

DAN DURLEY, PETITIONER

v.

NATHAN MAYO, as Custodian of State Prison, RESPONDENT

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

May 9, 1949

Upon consideration of the petition for writ of habeas corpus in the above cause, it appears that the petitioner has failed to show as a condition precedent to the writ of habeas corpus probable cause to believe that he is detained in custody without lawful authority, it is ordered therefore that said petition be and the same is hereby denied.

[fol. 54] In the Circuit Court of the Eighth Judicial Circuit, in and for Union County, Florida. At Law.

No. 578

DAN DURLEY, PETITIONER

v.

NATHAN MAYO, as Custodian of the Florida State Prison, RESPONDENT.

PETITION FOR WRIT OF HABEAS CORPUS—Filed January 30, 1952.

To the Honorable Judges, or either of them, of the above styled Court, at law sitting:

This is the petition of DAN DURLEY, of Raiford, Union County, Florida, for a writ of habeas corpus, and thereupon your petitioner represents and alleges unto Your Honor as follows:

One

That on or about the 19th day of October, A. D. 1945, your petitioner was convicted in the Criminal Court of Record, in and for Polk County, Florida, upon two Informa-

tions, each containing what purports to be three (3) separate counts, charging "Stealing Cattle", and sentenced therefore to a term of what purports to be five (5) years for each of said counts, in each of the said Informations, and aggregating into a thirty (30) year sentence. A copy of each of the said Informations is attached hereto and made a part hereof, as is a copy of each of the said sentences, which are attached hereto and made a part hereof.

Two

That each of the said "counts" in the aforesaid Informations [fol 55] charge the one and same crime that is charged by the other "counts" within the same Information; and each of the said "counts" does merely separate the goods which were the subject of the larceny; and that the said "counts" are not merely alternative or disjunctive, but do in fact charge the one and same crime.

Three

That the third "count" in the Information in case No. 4179 does repeat and reiterate verbatim that which is set out in the second "count" therein; and that both of the aforesaid "counts" do but repeat that same thing that is set out in the first "count" therein, and with specificity.

Four

That the maximum penalty, by way of imprisonment, for the crime of "Stealing Cattle" is five (5) years imprisonment in the State Prison.

Five

That the two Informations aforesaid, do make out but two crimes of "Cattle Stealing", and that the maximum sentence which could be meted out therefor is two five (5) year sentences to the State Prison; and that the sentences could be made consecutive, thereby making a maximum imprisonment therefor a period of ten (10) years.

Six

That your petitioner has already served, by virtue of the sentences resulting from the aforesaid Informations,

in the State Prison, a term of years, which combined with accrued gain time, is greater than the time necessary to satisfy a ten year sentence in the State Prison.

Seven

That there are no other sentences outstanding by virtue [fol. 56] of which your petitioner could at this time be imprisoned and detained.

Therefore, petitioner would show unto the Court that he is detained and imprisoned by the respondent herein, against his will and in direct violation of his rights as set out in the Constitution of the United States, and the Constitution of the State of Florida, and contrary to the laws of the State of Florida.

WHEREFORE, petitioner prays that a writ of habeas corpus issue, to be directed to the Honorable Nathan Mayo, as custodian of the Florida State Prison, respondent herein, and returnable forthwith, in order that the Court may inquire into the cause of the aforesaid restraint and detention of the petitioner, and upon such inquiry to do what shall then and there be considered lawful and proper concerning the said Dan Durley.

Petitioner further prays that the costs hereof be assessed against the State of Florida.

Dan Durley, PETITIONER

STATE OF FLORIDA,

County of Union

Before me the undersigned authority, personally appeared Dan Durley, who after being duly sworn deposes and says: That his name is Dan Durley, and that he is the petitioner in the foregoing petition, and the statements therein made are true and correct.

Dan Durley.

Sworn to and subscribed before me this 30th day of January A. D., 1952, Lawrence E. Dugger, Notary Public, State of Florida at large.

My commission expires September 19, 1954. Bonded by American Surety Co. of N. Y. (Official Seal Affixed)

Theron A. Yawn, Jr., Attorney at Law, Starke, Florida, Counsel for Petitioner.

[fols. 57-58] EXHIBIT TO PETITION

INFORMATION FOR STEALING CATTLE—[Omitted. Printed side page. 11 ante.]

[fols. 59-60] EXHIBIT TO PETITION

SENTENCE FOR STEALING CATTLE

[Omitted. Printed side page 12 ante.]

[fols. 61-62] EXHIBIT TO PETITION

INFORMATION FOR STEALING CATTLE

[Omitted. Printed side page 10 ante.]

[fol. 63] EXHIBIT TO PETITION

SENTENCE FOR STEALING CATTLE

[Omitted. Printed side page 13 ante.]

[fol. 64] CERTIFICATE OF SERVICE (omitted in printing)

[File endorsement omitted.]

[fol. 65] IN THE CIRCUIT COURT OF UNION COUNTY

WRIT OF HABEAS CORPUS—January 31, 1952

In the name of the State of Florida:

To the Honorable Nathan Mayo, As Custodian of the Florida State Prison:

You are hereby commanded to have the body of Dan Durley, by you imprisoned and detained, as it is said, together, with the time and cause of such imprisonment and detention, by whatsoever name the said Dan Durley shall

be called and charged, before me, one of the Judges of the Circuit Court, Eighth Judicial Circuit, in and for Union County, State of Florida, at the Courthouse in Alachua County, City of Gainesville, and State of Florida, at 11 o'clock A. M. on the 7th day of February, A. D., 1952, to do and receive what shall then and there be considered concerning the said Dan Durley and have you then and there this Writ.

Witness my hand this 31st day of January, A.D., 1952. John A. H. Murphree, Circuit Judge.

[File endorsement omitted.]

[fol. 66] IN CIRCUIT COURT OF UNION COUNTY

ORDER QUASHING WRIT OF HABEAS CORPUS - February 7, 1952

This cause came on to be heard upon a writ of habeas corpus and respondent's return thereto. Argument of counsel for the respective parties having been heard, and the court, being advised in the premises.

It is, thereupon, considered, ordered, and adjudged as follows:

1. The writ is quashed and the petitioner hereby remanded to the custody of the Respondent.
2. Petitioner having asked leave to appeal, consent is hereby granted.
3. Petitioner is insolvent and the cost of this proceeding and of the appeal, if taken, shall be paid by Union County, Florida.

Done and ordered in Chambers at Gainesville, Florida, this February 7, A.D., 1952.

John A. H. Murphree, Judge

[File endorsement omitted.]

[fol. 67] IN CIRCUIT COURT OF UNION COUNTY

[File endorsement omitted.]

RESPONDENT'S RETURN TO WRIT OF HABEAS CORPUS—Filed
February 7, 1952

Comes now the Respondent, Nathan Mayo, as custodian of the Florida State Prison, and for return to writ of habeas corpus issued in this cause, says:

1

He admits that on October 19, 1945, the petitioner was convicted in the Criminal Court of Record of Polk County under each of the three counts of each of two informations, and that the petitioner received a five-year sentence under each of said six counts, to run consecutively. He admits that the exhibits attached to the petition herein are substantially correct copies of the charging parts of the informations, and of the judgments and sentences, in said cases.

2

He denies the allegations of paragraph Two of the petition herein, and each of them severally. He denies that any count of either of said informations charges the same larceny as is charged in the other counts of the same information, or either of them. He denies that the larceny charged any count of either of said informations was committed at the same time and place and under the same circumstances as the larceny charged in the other counts of the same information, or either of them.

3

He admits that counts 2 and 3 of the information in case #4179 (which information charged the larceny of animals belonging to William C. Zipperer) are couched in similar verbiage, but he denies that the larceny of heifer charged in the third count is the same larceny as the larceny of [fol. 68] heifer charged in the second count. He denies the petitioner's allegations that the second and third counts "do but repeat that same thing that is set out in the first 'count' therein, and with specificity".

He admits the allegations of paragraph Four of the petition.

He denies that the said two informations made out only two crimes of cattle stealing, and he says that each count of each of said informations charged a separate, distinct larceny of cattle. He denies that the maximum sentence which could be meted out under each information was five years, and says that it was lawful to impose a five-year sentence under each count of each information, and to prescribe that they run consecutively.

He admits the allegations of paragraphs Six and Seven of the petition.

He admits that he holds the petitioner in custody under and by virtue of said sentences, but he denies that said custody is unlawful.

He produces the body of the petitioner before the Court at the time of making this return.

Respectfully submitted, Nathan Mayo, as Custodian of the Florida State Prison, Respondent. Richard W. Ervin, Attorney General, Reeves Bowen, Assistant Attorney General, Counsel for Respondent.

[fol. 69] [File endorsement omitted.]

[fols. 70-71] IN CIRCUIT COURT OF UNION COUNTY

NOTICE OF APPEAL—Filed February 21, 1952

The petitioner, Dan Durley, takes and enters his appeal to the Supreme Court of Florida to review the judgment or order of the Circuit Court of Union County, Florida, bearing date the 7th day of February, 1952, entered in the above

styled cause and recorded in Circuit Court Minute Book 2 at page 217, whereby the Writ of Habeas Corpus issued out of said Court on the 31st day of January, 1952, in behalf of the said petitioner was ordered quashed and the petitioner remanded to the custody of the respondent.

All parties to this cause are hereby called upon to take notice of this appeal.

Theron A. Yawn, Jr., 119 East Call Street, Starke, Florida, Attorney for Petitioner.

[File endorsement omitted.]

[fol. 72] IN THE SUPREME COURT OF FLORIDA

DAN DURLEY, APPELLANT,

vs.

NATHAN MAYO, AS CUSTODIAN OF THE FLORIDA STATE PRISON,
APPELLEE

ORDER DISMISSING APPEAL—April 1, 1952

Upon consideration of motion of counsel for Appellee to dismiss the appeal in this cause, it is ordered that said motion be and the same is hereby granted and the appeal which was entered herein in the Circuit Court of Union County, Florida, on February 21st, 1952, be and the same is hereby dismissed.

[fol. 73] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 74] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—October 24, 1955

On petition for writ of Certiorari to the Supreme Court of the State of Florida

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted and the case is transferred to the appellate docket at No. 489.

October 24, 1955.

(6238-0)

